PP

v.

LETCHUMANAN

HIGH COURT MALAYA, KUALA LUMPUR
[CRIMINAL TRIAL NO: 45-57-98]
AUGUSTINE PAUL J
28 AUGUST 2000

CRIMINAL PROCEDURE: *Trial - Prima facie case - Whether prosecution had established a prima facie case*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in a dangerous drug - Possession - Whether accused was in possession - What constitutes possession - Meaning of 'anything whatsoever containing any dangerous drug' - Section 37(d)*

EVIDENCE: *Presumption - Possession of dangerous drugs - Whether proof of custody and control sufficient to activate presumption of possession - Dangerous Drugs Act 1952, s. 37(d)*

EVIDENCE: *Presumption - Adverse inference - Material witness not produced - Whether presumption of adverse inference to be invoked - Whether fatal to prosecution's case - Evidence Act 1950, s. 114(g)*

The accused was charged with trafficking in 56.2g of a mixture of heroine and monoacetylmorphines under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s. 39B(2) of the Act. The prosecution's case was that the accused was found riding a motorcycle bearing registration WDU 4259 and that in the basket carrier of the motorcycle was an orange-coloured plastic bag containing a pinkish substance later established to be heroin and monoacetylmorphines.

The prosecution called a total of six witnesses in support of its case. They were police photographers (PW1 and PW2), the investigating officer (PW3), the owner of the motorcycle (PW4), the raiding officer (PW5) and an officer experienced in drug-related matters (PW6). According to the facts, the motorcycle had been sold by PW4 to one Ganesan. However, the accused was riding the motorcycle at the material time.

With the dangerous drugs in the carrier of the motorcycle, the issue was whether proof of custody and control of the motorcycle was sufficient to activate the presumption under s. 37(d) of the Act to show that the accused was in possession of the dangerous drugs. The question to be decided was whether the motorcycle was capable of coming within the ambit of the words 'anything whatsoever containing any dangerous drug' in s. 37(d) of the Act.

Held:

[1] The words 'anything whatsoever' by themselves have as wide a meaning as any words can have but that meaning is governed and generally restricted by the word 'containing'. A thing containing another thing is not synonymous with a thing in which that other thing is. Both by derivation and by ordinary usage, the word 'containing' implies some measure of holding or restriction. A motorcycle therefore does not come within the meaning of the words 'anything whatsoever containing' in s. 37(d) of the Act.

[2] At the material time, the accused was the rider of the motorcycle. He was in charge of it but he was not the owner. The prosecution did not adduce any evidence to show the length of time during which the accused was in charge of the motorcycle prior to his detention. In such circumstances it could not be inferred that the accused was in possession of the dangerous drugs.

[3] It would have been possible for an inference of possession to be made if there was evidence to show that the accused had the use of the motorcycle for quite a while. The evidence of Ganesan would have been material to unfold the narrative upon which the prosecution case was based. He was a material witness and ought to have been called to testify and the failure to do so was fatal to the prosecution's case on the application of s. 114(g) of the Evidence Act 1950.

[4] The prosecution could have relied on the evidence of the conduct of the accused in resisting arrest and attempting to run away that would lead to the inference that he had knowledge of the dangerous drugs. However, although evidence of conduct was admissible, it must be considered in the totality of the evidence adduced. There must be a nexus between the conduct of the accused, his flight and the offence in question. Mere absconding is not such a vital circumstance which can be considered to show that the absconder has a quilty mind.

[4a] On the facts, there was no nexus between the conduct of the accused and the offence with which he had been charged.

[Accused acquitted and discharged without being called to enter defence.]

Case(s) referred to:
Bhagat Bahadur v. State [1996] Cri LJ 2201 ***(refd)***
Chan Kwok Keung & Anor v. The Queen [1990] 1 CLJ 411 ***(refd)***
Chang Kim Siong v. PP [1968] 1 MLJ 36 ***(refd)***
Pendakwa Raya v. Mansor Mohd Rashid [1997] 1 CLJ 233 ***(refd)***
Syed Ali Syed Abdul Hamid & Anor v. PP [1982] 1 MLJ 132 ***(refd)***
Tong Peng Hong v. PP [1955] MLJ 232 ***(refd)***
PP v. Chan Peng Fatt [1999] 8 CLJ 414 ***(refd)***
PP v. Lin Lian Chen [1992] 1 CLJ 2086 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 39B(1)(a), (2), 37(d), (h)
Evidence Act 1950, ss. 8, 114(g)

For the prosecution - Azhar Abdul Hamid (Lukman Zainuddin with him); A-G's Chambers
For the accused - M Kayveas; M/s Blance Kayveas & Co

Reported by Mariette Peters-Goh

JUDGMENT

Augustine Paul J:

The accused was charged with trafficking in 56.2 grammes of a mixture of heroine and monoacetylmorphines under s. 39B(1)(a) of the Dangerous Drugs Act ("the Act") and punishable under s. 39B(2) of the Act. He claimed trial to the charge. At the close of the case for the prosecution I ruled that the prosecution had not made out a *prima facie* case against the accused and, accordingly, acquitted and discharged him without calling upon him to enter his defence. This appeal is by the public prosecutor against the order made by me.

The prosecution called a total of six witnesses in support of its case. Khalid bin Ujang (PW1) and Kamarulzaman bin Sabirin (PW2) were police photographers. Inspector Tansli Mering (PW3) was the investigating officer of the case while Inspector Mohd Azam bin Abdul Razak (PW5) was the raiding officer. Inspector Wan Azlan bin Wan Mamat (PW6) is an officer

experienced in drug-related matters. Liew Chee Far (PW4) was the owner of motorcycle bearing registration number WDU 4259 in 1997. On 26 November 1997 PW5 led a party of seven police officers consisting of G Jaganathan a/l R Govindan, Abdul Razak bin Abdul Majid, Abdul Rahman bin Mohd Yusuff, Abdullah bin Haji Abdul Rahman, Sum Kok Wah, Razali bin Md Kassim and Mohd Noor bin Mohd Dom to conduct an observation at a shopping area in Taman Pelangi Jaya Satu, Sentul, Kuala Lumpur in respect of a male Indian using a blue Suzuki RG Sport motorcycle bearing registration number WDU 4259 ("the motorcycle"). They kept observation for about 30 minutes. They then saw the motorcycle coming towards that area. It was ridden by a male Indian. The motorcycle made a U-turn and stopped. As PW5 said in his evidence:

> Semasa lelaki India di atas motor saya melihat suspect menoleh kiri kanan seperti mencari seseorang. Tidak ada sesiapa bersama tertuduh di atas motosikal. Kenderaan tidak banyak di tempat itu pada masa itu kerana lepas hujan. Hujan masih ringan-ringan. Tempat motosikal berhenti dari tempat saya lebihkurang 6-7 kaki. Selepas motosikal itu berhenti saya lihat lelaki India tersebut menoleh kiri dan kanan seperti mencari seseorang dan saya nampak juga satu plastik berwarna oren dalam raga motosikal tersebut. Saya dapat juga motosikal itu masih lagi enjinnya belum dimatikan. Saya telah arahkan Cpl Md Noor untuk menangkap saspek. Cpl Md Noor menghampiri saspek dari arah belakang dan saya dengar Cpl Md Noor menjerit "Polis. Jangan lari" dan terus menangkap saspek. Pada masa yang sama saya pun menghampiri saspek dari arah hadapan saspek. Saya memperkenalkan diri "Polis" dan sebut "Jangan melawan". Semasa saya dan Cpl Md Noor menangkap saspek, saspek melawan bergelut dan cuba melarikan diri menyebabkan motosikal terbalik. L/Cpl Rahman dan G. Jaganathan membantu semasa tangkapan.
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> Selepas tangkapan saya dapati saspek sudah boleh ditangkap. Saya mengambil bungkusan oren dalam raga motosikal saspek. Dan saya buka plastik oren tersebut di hadapan saspek dan saksi polis lain saya dapati di dalamnya ada satu bungkusan keratan akhbar berbahasa Tamil bertarikh 14.11.97 yang mana di dalamnya terdapat dua bungkusan plastik yang mengandungi bahan serbuk dan ketulan kecil, bahan berwarna merah jambu yang saya syaki dadah heroin. Selepas itu saya membawa balik saspek bersama barang kes ke pejabat narkotik, IPK KL. Semasa dalam perjalanan balik ke IPK KL saya sendiri yang pegang barang kes dan saspek sentiasa bersama saya.

Subsequently PW5 handed the accused and the exhibits to PW3. PW3 sent the two packets suspected to contain heroin to the chemist for analysis who found the two packets to contain 56.2 grammes of heroin and monoacetylmorphines. The chemist report was duly served on the accused. PW4 was the previous owner of the motorcycle. As he said in his evidence:

> Dalam tahun 1997 saya mempunyai sebuah motosikal no WDU 4259. Jenisnya Suzuki Cub. Saya tidak lagi memiliki motosikal tersebut. Motosikal itu telah dijualkan kepada seorang yang bernama Ganesan a/l Suppiah yang berkerja di sekolah saya pada bulan September 1997. Harga dijual ialah RM2,800. Tiada perjanjian jualbeli dibuat. Saya tidak pergi ke JPJ untuk meneruskan pemindahan hakmilik tetapi saya ada serahkan JPJ K3 dan release letter, salinan IC saya kepada Ganesan a/l Suppiah. Saya diberitahu oleh beliau bahawa hal pemindahan hakmilik akan diuruskan.

Before closing its case the prosecution offered to the defence L/Kpl G Jaganathan, D/Kpl Abdul Razak bin Abdul Majid, L/Kpl Abdul Rahman Mohd Yusoff, Sjn/Major Abdullah bin Haji Abdul Rahman, L/Kpl Sum Kok Wah, L/Kpl Razali bin Md Kassim, D/Kpl Mohd Nor bin Mohd Dom, Inspector Mohd Khalid bin Nordin and the chemist, Ismail bin Talib. Learned counsel for the accused said that he did not wish to call the witnesses.

In considering whether the prosecution had made out a *prima facie* case against the accused a matter of prime consideration is the fact that he was not the owner of the motorcycle. It had been sold by PW4 to one Ganesan a/l Suppiah in September 1997. However, the accused was riding the motorcycle at the material time with the dangerous drugs in its carrier. Thus even though the motorcycle did not belong to the accused it was in his custody or control at the material time. That raises the question of whether proof of custody or control of the motorcycle is sufficient to activate the presumption contained in s. 37(d) of the Act to show that the accused was in possession of the dangerous drugs. The subsection reads as follows:

> Any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

The question to be decided is whether a vehicle, which would include a motorcycle, is capable of coming within the ambit of the words "anything whatsoever containing any dangerous drug" in the subsection. This question was answered by Thomson J (as he then was) in *Tong Peng Hong v. PP* [1955] MLJ 232 at p. 233:

> The words 'anything whatsoever' by themselves have as wide a meaning as any words can have but that meaning is governed and generally restricted by the word 'containing'. A thing containing another thing is not synonymous with

> a thing in which that other thing is. To take an extreme example, it is not correct to say the earth contains the fly which at the moment is walking up the wall in my chambers. Both by derivation and by ordinary usage the word 'containing' implies some measure of holding or restriction. The jar contains the jam but the cupboard contains the jar. In short, a container is not something in which another thing is. It is something which surrounds or holds another thing so as to prevent that other thing from being elsewhere.

It was accordingly held that a lorry does not come within the meaning of the words "anything whatsoever containing" in the subsection. Similarly it has been held that a car (see *Syed Ali bin Syed Abdul Hamid & Anor v. PP* [1982] 1 MLJ 132) and a television set (see *PP v. Chan Peng Fatt* [2000] 1 MLJ 179) do not come within the subsection. In following *Tong Peng Hong* Edgar Joseph Jr SCJ in writing for the (then) Supreme Court in *PP v. Lin Lian Chen* [1992] 2 MLJ 561 said at p. 567:

> In the first place, we would respectfully agree with the proposition of law enunciated by Thomson J (as he then was) in *Tong Peng Hong* [1955] MLJ 232, that a vehicle in which a drug is carried does not *ipso facto* fall within the words 'anything whatsoever containing any dangerous drug' and therefore in such a case, the presumption contained in s. 37(d) does not arise.

It is therefore my view that a motorcycle does not come within the meaning of the words "anything whatsoever containing" in s. 37(d) of the Act. The presumption contained in the subsection therefore does not arise. The presumption contained in s. 37(h) of the Act also does not arise as the dangerous drugs were not found concealed in a specially constructed compartment of the motorcycle.

On the facts of this case, therefore, the prosecution must rely on circumstantial evidence to prove that the accused was in possession of the dangerous drugs. It is settled law that where the prosecution is relying on circumstantial evidence the onus upon it is a very heavy one and that evidence must point irresistibly to the guilt of the accused (see *Chang Kim Siong v. PP* [1968] 1 MLJ 36). The facts of this case reveal that at the material time the accused was the rider of the motorcycle. He was therefore in charge of it. But he was not its owner. The prosecution did not adduce any evidence to show the length of time during which the accused was in charge of the motorcycle prior to his detention. In such circumstances it cannot be inferred that the accused was in possession of the dangerous drugs. In this respect I consider it pertinent to refer to *Lin Lian Chen* where Edgar Joseph Jr SCJ said at p. 567:

> Turning to the evidence, although it is true that the respondent was the sole occupant of the Honda, being the driver and therefore in charge of it, the fact remains, that he was not its owner and, there was no evidence from which it could be reasonably inferred that he must have been in custody or control of the seven newspaper packages or the cigarette packet which contained the offending exhibits.

However, it is possible for an inference of possession to be made if there had been evidence to show that the accused had the use of the motorcycle for quite a while. That will eliminate the probability that he took it from its owner, Ganesan a/l Suppiah, with the packet containing the dangerous drugs in the carrier. If such a probability had been eliminated by the prosecution by calling Ganesan a/l Suppiah as a witness then it can be inferred that the accused was in custody of the dangerous drugs. The further evidence of the conduct of the accused in resisting arrest and attempting to run away in such circumstances would lead to the inference that he had knowledge of the dangerous drugs. In that event the prosecution would have proved that the accused was in possession of the dangerous drugs. However, in the absence of Ganesan a/l Suppiah being called as a witness the prosecution is only left with the evidence of conduct of the accused. It must be observed that though evidence of conduct is admissible under s. 8 of the Evidence Act 1950 the weight of such evidence depends on the facts of each case. It must be considered in the totality of the evidence adduced (see *Pendakwa Raya v. Mansor bin Mohd Rashid* [1996] 3 MLJ 560). In *Chan Kwok Keung & Anor v. The Queen* [1990] 1 CLJ 411 it was held that for the flight of an accused to be capable of amounting to an admission of guilt there must be a nexus between the conduct of the accused, his flight and the offence in question. Mere absconding is not such vital circumstance which can be considered to show that the absconder was having any guilty mind (see *Bhagat Bahadur v. State* [1996] Cri LJ 2201). On the facts of this case there is no nexus between the conduct of the accused and the offence with which he has been charged. In the circumstances the conduct of the accused can only show that he had knowledge of the dangerous drugs in the motorcycle. But as Edgar Joseph Jr SCJ said in *Lin Lian Chen* at p. 567:

> … mere knowledge of the presence of the seven newspaper packages or the cigarette packet in the Honda without more would not be sufficient to constitute custody or control thereof though it would constitute an essential step in that direction.

The prosecution could have relied on the conduct of the accused to establish his guilt if it had called Ganesan a/l Suppiah to testify that the motorcycle had been with the accused for quite a while and that the dangerous drugs recovered are not his. The evidence of Ganesan a/l Suppiah is therefore material to unfold the narrative upon which the prosecution case is based. As he is a material witness he ought to have been called to testify and the failure to do so is fatal to the prosecution case on the application of s. 114(g) of the Evidence Act 1950.

In the upshot I ruled that the prosecution had not made out a *prima facie* case against the accused and, accordingly, acquitted and discharged him without calling upon him to enter his defence.